92-520

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ADAM CHARLES BREMNER, by and through his guardian ad litem Deborah A. Bremner, DEBORAH A. BREMNER and BRIAN G. BREMNER, PETITIONERS,

V.

ELLEN CHARLES, MD, JOSEPH H. DIEHL, MD, and PENDLETON COMMUNITY MEMORIAL HOSPITAL, an Oregon non-profit corporation, RESPONDENTS,

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI

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September 16, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Amendment permits a state court to ban a personal injury plaintiff from his or her trial, absent any showing of disruption.

2. Whether the Fourteenth Amendment permits a court to exclude a party from his or her trial without seeing the party and without finding any probability of disruption.

3. Whether, consistent with the Fourteenth Amendment, a state court litigant may be denied any appellate ruling on claimed violations of his federal and state constitutional rights, among other claims of error.

PARTIES TO THIS PROCEEDING

All parties appear in the caption.

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REPORTS OF PROCEEDINGS BELOW

The Oregon Supreme Court's decision was reported at 312 Or 274, 821 P2d 1080 (1991). The Oregon Supreme Court's decision on reconsideration is reported at 313 Or 339, __ P2d __ (1992).

The Oregon Court of Appeals' decision is reported at 104 Or App 75, 799 P2d 188 (1990).

BASIS FOR JURISDICTION

1. The Oregon Supreme Court judgment sought to be reviewed was entered on November 22, 1991.

2. The Oregon Supreme Court allowed reconsideration on March 24, 1992. The Oregon Supreme Court judgment on reconsideration was entered on June 18, 1992.

3. This Court's jurisdiction is conferred by 28 USC Section 1257.

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment VII provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution Amendment XIV Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Constitution Article VII section 3, and Article I section 17, are set out on pages 12 and 13 below.

STATEMENT OF THE CASE

Facts

Petitioner Adam Bremner is a child born on March 24, 1984. In 1986 he filed this common law action for damages, alleging that his medical care providers were negligent. The trial court bifurcated the proceedings for separate verdicts on "liability" and "damages." The court then ruled that plaintiff could not appear in the courtroom, prior to the jury verdict, without permission.

Permission to appear was expressly denied.

The court never viewed Adam or his image, and no claim was made that Adam was grotesque or disruptive.

During the course of the trial various other substantially prejudicial errors of law occurred. Petitioner appealed a defense verdict, raising ten assignments of error, in strict accordance with appellate rules and practice.

Petitioner's opening brief cited the Seventh Amendment and other constitutional provisions in support of his first two assignments of error -- (1) the bifurcation was error; (2) the ban from the trial was error.

- The Oregon Court of Appeals reversed, finding an abuse of judicial discretion, based on the first two

assignments only. That court did not cite constitutional grounds for its decision, and did not rule on appellants' eight remaining assignments of error.

On Respondents' Petition for Review, the Oregon Supreme Court reversed the Court of Appeals and affirmed the trial court. In doing so, the Supreme Court specifically declined to rule on any of Petitioner's constitutional arguments.

Petitioner moved for reconsideration, which was supported by amici curiae, and the motion was allowed by the court. On reconsideration the Court adhered to its original decision without elaboration.

No appellate court has ruled on Petitioner's claims that he has been denied his state and federal constitutional rights to a jury trial.

No appellate court has addressed eight of Petitioner's assignments of error. (Petitioner has resubmitted the case to the Oregon Court of Appeals to address the remaining assignments. This aspect of the 14th Amendment violations claimed by Petitioner is therefore not ripe, and is raised solely to prevent any contention of waiver.)

Stage at Which Federal Question Raised

Petitioner opposed his exclusion in the trial court, stating:

> "Our position would be that as the plaintiff, he's got a fundamental constitutional right to be in the court." [Oregon Constitution cited] (Transcript Vol 6, page 1100)

In his opening brief in the Court of Appeals, Petitioner argued, inter alia:

> "Summary of Arguments ***

"2. A non-disruptive party should never be banned from his or her trial. If such a radical interference with one's right to a trial could ever be justified, it could only be upon a finding that the party is both incompetent and has grotesque injuries which would presumptively prejudice a jury. (Appellant's Brief, page 2.)

*****

"The sanctity of a jury trial is even more staunchly vouchsafed in Oregon than in the federal system. Oregon Constitution Article VII, Sec 3, provides:

'In all actions at law, where the value in controversy shall exceed $200, the right of Trial by Jury shall be preserved, and no fact tried by a jury shall be otherwise

re-examined in any court of the state, unless the court can affirmatively say there is no evidence to support the verdict.'

"That provision is nearly identical to the 7th Amendment of the United States Constitution. The Oregon Constitution, however, also uses stronger language to guarantee the right to the jury trial existing at the time of statehood. Article I, Sec 17 provides that:

'In all civil cases the right of Trial by Jury shall remain inviolate.'

(Appellants' Brief, page 16.)

*****

"The leading case following Dickson [130 NW2d 526, Minn 1965] is Helminski v. Ayerst Lab, 756 F2d 208, (6th Cir 1985), which holds that a plaintiff can

be properly excluded only if the trial judge personally observes the individual and holds a hearing at which the defendant meets the burden of proving the likelihood of undue prejudice, and the fact that the party could not aid his or her lawyer.

"Plaintiffs contend that the safer course for the protection of a party's rights under Or Const Art I, sections 10 and 17 and Art VII, section 3, and for the well being of the jury system, is charted by Marks v. Mobil Oil Corp., 562 F Supp 759, 768 (ED Pa 1983):

> 'A party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary. In a civil case this Court can, at this time, envision no reason to exclude a party because of his injuries, particularly, whereas in

this case, the party's behavior was not disruptive.'"

(Appellants' Brief, page 24.)

The issues were discussed further in other briefs and at oral argument.

REASONS FOR GRANTING THE WRIT

1. The Oregon courts have deprived Petitioner of a basic right fundamental to the American scheme of justice.

An American citizen's right to a jury trial is a fundamental one by any measure. As the Court stated in Parsons v. Bedford, 28 U.S. 433, 7 LEd 732 (1830):

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment on it has been watched with deep jealousy. The right to such a trial is, it is believed,

incorporated into, and secured in every state constitution in the Union; ***"

U.S. 28 at 445.

See also Dimick v. Schiedt, 293 U.S. 474, 485, 55 SCt 296, 79 LEd 603 (1935).

The Seventh Amendment was enacted to ensure that the right to jury trial in civil cases, secured by all the state constitutions of the time, would always be available. Typical of the Bill of Rights, the initial focus of the amendment was on the new federal government, but its basic purpose was protection of a right that was deemed fundamental at the time regardless of government. The Court stated in Galloway v. United States, 319 U.S. 372, 63 SCt 1077, 87 LEd 1458 (1943):

"The more logical conclusion, we think, and the one which both the history and the previous decisions here support, is

that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 319 U.S. at 392

Seventh Amendment analysis has been replete with the observation that the amendment does not apply to the states. This simplification arose from the time of Barron v. Baltimore, 32 U.S. 242, 7 Peters 242 (1833), when Chief Justice Marshall made it clear that the Bill of Rights limited federal rather than state action. After the enactment of the Fourteenth Amendment, however, various fundamental rights from the first ten amendments were held to limit state action. Palko v. Connecticut, 302 U.S. 319, 58 SCt 149, 82 LEd 2888 (1937)

addressed the fact that certain basic rights had been "brought within the Fourteenth Amendment by a process of absorption." 302 U.S. at 326. These were such rights that "neither liberty nor justice would exist if they were sacrificed." 302 U.S. at 326.

2. Some decades later the Court went beyond the Palko analysis to provide greater adherence to the guarantees of the Bill of Rights. In Benton v. Maryland, 395 U.S. 784, 89 SCt 2056, 23 LEd2d 707 (1969), the Court stated:

> "Our recent cases have thoroughly rejected the Palko notion that basic constititutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is

'fundamental to the American scheme of justice,' Duncan v. Louisiana, supra, at 149, the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795 (emphasis supplied)

Particularly when the state and federal constitutions contain nearly the identical provisions, as in this case, the same constitutional standards must apply. Adopting a view like that expressed in Dimick, supra, could be very helpful in dealing with forthcoming Seventh Amendment issues. In that case the Court said:

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with

the utmost care." 293 U.S. at 486,

The demands for greater efficiency are certain to spur pressures on the traditional trial such as bifurcation and exclusion. The 6th Circuit in Helminski, supra, 756 F2d 208, has emphasized the need for standards in determining whether exclusion should be ordered. The District Court in Marks, supra 563 F. Supp at 768, has suggested that an "overwhelming reason" would be required for exclusion. Development of a clear and sound Seventh Amendment analysis based on the substance of the right at issue would discourage case-by-case review of whether a procedure is lawful, and help reach the same result, but without all the labeling, that seems to be repeatedly required in cases such as Lyttle v. Household Mfg Inc., 494 U.S. 545, 110 SCt

1331, 108 LEd2d 504 (1990), and Chauffeurs, Teamsters v. Terry, 494 U.S. 558, 82 SCt 814, 108 LEd2d 519 (1990).

In order that a litigant's right to attend his or her trial does not depend on mere chance, in violation of the Equal Protection Clause, there must be a clear constitutional standard for exclusion. At a minimum such a standard requires the trial judge to observe the party and be convinced that the party's appearance would probably be disruptive. Arguably, a grotesque appearance could cause a sufficient disruption. In the present case, however, there was not even the claim that Adam Bremner was either grotesque or disruptive. As Respondent Diehl's counsel stated at oral argument:

> "We have not claimed in this case that the child was necessarily. . . would have been disruptive. We

certainly haven't claimed that his appearance was grotesque." (Audio tape of argument, side 2, tape counter c. 210)

Petitioner did not have a choice of forums to bring his common law action. He had one chance to go to court, in a state whose constitution guarantees a jury trial. Yet when he tried to have his literal day in court he was refused entry, without even being seen by the judge. The Seventh Amendment, either directly or through the Fourteenth Amendment, prohibits this outcome.

3. The Oregon high court refused to consider its own state's constitutional provisions governing the right to a jury trial. In footnote 11 the court refers to a test of issue preservation that it has never enunciated. As demonstrated by the

amicus briefs filed in support of reconsideration by the ACLU of Oregon and the Oregon Trial Lawyers Association, and the portions of the record set out at pages 11-15 above, Petitioner plainly raised constitutional claims.

By requiring some unspecified method of raising or relying on constitutional provisions, other than by citing them in the briefs and at argument, the Oregon Supreme Court has violated the principle of Lindsey v. Normet, 405 U.S. 56, 92 SCt 862, 31 LEd2d 36 (1972):

> "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S. at 77. See also Cole v. Arkansas, 442 U.S. 1303, 68 SCt 514, 92 LEd 644 (1948).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Oregon Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OREGON

Adam Charles BREMNER,
by and through
his guardian *ad litem* Deborah A. Bremner,
Deborah A. Bremner and Brian G. Bremner,
Respondents on Review,

v.

Ellen CHARLES, M.D.,
Joseph H. Diehl, M.D.,
and Pendleton Community Memorial Hospital,
Petitioners on Review.

(TC 86-163; CA A45607;
SC S37713, S37668, S37674)

In Banc

On review from the Court of Appeals.*

Argued and submitted April 2, 1991.

Jeffrey S. Eden, of Cooney, Moscato & Crew, P.C., Portland, argued the cause and filed the petition for petitioner on review Ellen Charles, M.D.

Mildred J. Carmack, of Schwabe, Williamson & Wyatt, Portland, argued the cause and filed the petition for petitioner on review Joseph H. Diehl, M.D.

Lindsey H. Hughes, of Hallmark, Keating & Abbott, Portland, argued the cause and filed the petition for petitioner on review Pendleton Community Memorial Hospital.

Jossi Davidson, of Gracey & Davidson, Silverton, argued the cause and filed the response brief for respondents on review.

UNIS, J.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

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* Appeal from judgment of Umatilla County Circuit Court, Jack F. Olsen, Judge. 104 Or App 75, 799 P2d 188 (1990).

[BLANK IN ORIGINAL]

UNIS, J.

In this medical negligence case, we are asked to resolve two issues: first, whether the trial court erred in ordering a bifurcated trial on the issues of liability and damages; and, second, whether the trial court erred when it prohibited plaintiff Adam, a brain-damaged child who was then three years old, from being in the courtroom for a brief appearance during the liability phase of the trial.

Adam could not comprehend the proceedings, meaningfully participate in them, or assist his lawyers. He was represented by his mother as guardian *ad litem*. As Adam's guardian *ad litem* and on her own behalf, Adam's mother[1] filed a complaint alleging negligence of three defendants who were involved in different stages of mother's pregnancy and Adam's birth. Those defendants are Dr. Charles, mother's obstetrician during her pregnancy with Adam; Dr. Diehl, who attended mother during her labor and delivery; and Pendleton Community Memorial Hospital, where Adam was delivered. Plaintiffs alleged that Adam suffered permanent brain damage as a result of defendants' negligence. According to the complaint, Adam will continue to suffer mental retardation, seizures, inability to control his limbs, and other bodily dysfunctions.

Several weeks before trial, the parties attended an informal meeting to discuss, among other things, evidentiary stipulations. During the course of that meeting, plaintiffs advised defendants that they hoped to conclude their case in chief with one week of testimony. Defendants scheduled their own witnesses based on this tentative plan. On the morning of trial in Pendleton, plaintiffs advised defendants and the trial court that plaintiffs would require "an extra day or maybe a day-and-a-half" beyond their original estimate to present their case in chief. Plaintiffs submitted to defendants and to the trial court a list of witnesses whom plaintiffs intended to call, identifying each witness as either a "liability" or a "damages" witness.

On being advised that plaintiffs would require additional time, defendants moved to bifurcate the trial and to

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[1] Plaintiff Brian Bremner, Adam's father, was voluntarily dismissed by the court on stipulation.

allow the parties first to try the liability portion of the case and then, if necessary, to try the matter of damages. Defendants contended that bifurcation would enable the parties to adhere to the original schedule so that their witnesses would not need to be rescheduled. Numerous medical experts, nearly all of whom were from out of town (some were from out of state) and needed to be flown in and out of Pendleton, had been scheduled in advance of trial.

The trial court allowed plaintiffs the time that they requested to respond to the motion to bifurcate. After considering their position, plaintiffs objected to bifurcation on two grounds: First, the jury might find for defendants on the liability issue in order to be released sooner; and, second, bifurcation would complicate their case because of the need to reschedule their witnesses.[2] On the basis of the arguments and representations made by both parties, the trial court, convinced that bifurcation of the liability and damages issues for trial by the same jury would "result in economy of time for everyone concerned," ordered bifurcation.

After that ruling, but before trial, defendants moved to exclude Adam from the courtroom in the liability phase, and the trial court reserved its ruling. Several days into plaintiffs' case in chief in the liability phase of the trial,[3] plaintiffs asked that the trial court allow Adam to enter the

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[2] Specifically, plaintiffs' lawyer, in objecting, stated:

"One is that I think that it's only fair to assume that the jury * * *, when they were making a determination with regard to the liability aspect, they could * * * consider that if they found for the Defendants, they would be able to go home. Whereas if they found for Plaintiffs and in favor of any one or more of the Defendants on the liability issue, that they would then be required to come back and continue with more proceedings.

"Secondly, Plaintiffs' case would be substantially complicated in that our witnesses, as was shown at the pretrial conference, have been interspersed with liability and damage witnesses, and I frankly do not know – I know that there's one liability witness on Friday that has indicated * * * that was the date he could make it, I believe. And I don't, also, know if we would then be able to reschedule – reorder our witnesses so that we could get all of the liability case on within whatever time period that would take. And it would * * * take a lot of phone calling and so forth, to try to figure out."

1 Tr 29-30. In overruling plaintiffs' objection, the trial judge stated that he suspected there is "always some juggling in every trial" and that he did "not intend telling the jury when they go out that if they find a defense verdict, they don't have to come back."

[3] Plaintiffs' case consumed six days.

courtroom solely for a brief appearance to allow the jury to view him. The trial court, without ever seeing Adam, denied plaintiffs' request.

Following nearly three weeks of trial on the liability issue, the jury rendered a unanimous verdict for defendants. Judgment for defendants was entered. Plaintiffs appealed. The Court of Appeals reversed and remanded for a new trial, holding that the trial court erred in bifurcating the trial and in not allowing Adam to enter the courtroom for a brief appearance. *Bremner v. Charles*, 104 Or App 75, 799 P2d 188 (1990). We allowed review and now reverse the decision of the Court of Appeals.

We first address whether the trial court erred when it bifurcated the trial into a liability phase followed, if necessary, by the damages phase. We review the decision to bifurcate for abuse of discretion. *See Vander Veer v. Toyota Motor Distributors*, 282 Or 135, 144, 577 P2d 1343 (1978) (applying the standard). Because a trial court's ruling on a motion for bifurcation of issues concerns "the administration of the business of the trial court," the trial judge is granted broad discretion in making such rulings. *Black v. Funderburk*, 277 Or 157, 159, 560 P2d 272 (1977) (quoting *Weiss v. Northwest Accept. Corp.*, 274 Or 343, 356, 546 P2d 1065 (1976)).[4]

ORCP 53B permits bifurcation of issues under certain specific circumstances:[5]

> "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or issues, always preserving inviolate the right of trial by jury as

[4] *Weiss v. Northwest Accept. Corp.*, 274 Or 343, 356, 546 P2d 1065 (1976), dealt with *former* ORS 11.050 and *former* ORS 11.060. Except for the elimination of the words "upon motion of any party" from ORCP 53B, ORCP 53B is the same as *former* ORS 11.050, and ORCP 53A is essentially the same as *former* ORS 11.060. *Black v. Funderburk*, 277 Or 157, 159, 560 P2d 272 (1977), dealt with *former* ORS 11.060.

[5] *See also* OEC 611(1), which states that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth." "The Oregon Evidence Code shall be construed to secure fairness in administration [and] elimination of unjustifiable expense and delay * * * to the end that the truth may be ascertained and proceedings justly determined." OEC 102.

declared by the Oregon Constitution or as given by statute."[6]

Under ORCP 53B, the trial judge may order a separate trial of any claim or of any separate issue or issues only (1) in furtherance of convenience, (2) to avoid prejudice, or (3) if conducive to expedition and economy.[7] A decision to bifurcate under ORCP 53B may be made by a trial judge, therefore, only as a result of an informed exercise of discretion on the merits of each case.[8] Bifurcation of issues for trial is not to be ordered routinely. A prerequisite to the exercise of discretion is that bifurcation will promote one or more of the purposes of the rule, *i.e.*, convenience, avoidance of prejudice, or conduciveness to expedition and economy.

In this case, the trial court's decision to bifurcate is in accordance with two of those purposes – convenience and expedition and economy. The bifurcation order permitted the parties to adhere to their original trial schedule in a complex, multi-party medical negligence action and obviated the

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[6] ORCP 53B was promulgated originally by the Council on Court Procedures on December 2, 1978, and was submitted to the Legislative Assembly at its 1979 Regular Session pursuant to ORS 1.735. Note preceding ORCP 1. ORCP 53B is based on *former* ORS 11.060, enacted in 1973, Or Laws 1973, ch 85, § 2, which is substantially similar to Rule 42(b) of the Federal Rules of Civil Procedure.

Former ORS 11.060, the statutory predecessor to ORCP 53B, was part of a bill recommended by the Oregon State Bar to authorize both consolidation of actions and separate trials of portions of a single action, at the discretion of the trial court. The proposal for the bill explained:

> "Equally desirable to consolidation where appropriate is a means whereby a party upon motion may obtain a separate trial of any claim, counterclaim or issue pending in any suit or action. Frequently the trial of one separate issue is determinative and dispositive of the case, and such a trial of a segregated issue is often much less time consuming and less expensive to all the parties. A separate trial may result in the avoidance of substantial prejudice to a party."

Oregon State Bar, 1972 Committee Reports 198.

[7] Under FRCP 42(b), the federal counterpart to ORCP 53B, the presence of any one of these standards – convenience, avoidance of prejudice, and conduciveness to expedition and economy – is also sufficient to sustain an order of separation of trial in the exercise of informed discretion. *See* 5 Moore's Federal Practice ¶ 42.03[1]; Annot., *Propriety Of Ordering Separate Trials As To Liability And Damages, Under Rule 42(b) Of Federal Rules Of Civil Procedure, In Actions Involving Personal Injury, Death, Or Property Damage*, 78 ALR Fed 890, 897-98 (1986), and cases collected therein.

[8] The decision must be case specific. A routine order of bifurcation in all actions involving personal injury or death actions, for example, would be a practice at odds with the requirement that informed discretion be exercised. *See Lis v. Robert Packer Hospital*, 579 F2d 819, 824 (3d Cir), *cert den* 439 US 955 (1978) (stating principle as to FRCP 42(b)).

rescheduling of numerous witnesses' appearances (most of whom were nonresident medical experts) and airplane flights.

Plaintiffs did not object to bifurcation on the ground that the issues of liability and damages were interwoven. In fact, on the list of witnesses which plaintiffs submitted to the trial court and to defendants, plaintiffs identified each witness as either a "liability" or a "damages" witness.[9] Nothing in the record suggests that bifurcation prevented plaintiffs from introducing damages evidence that was also related to liability. Although plaintiffs argued that bifurcation of the issues would complicate their case because of the need to reschedule their witnesses, plaintiffs did not request a continuance of the trial. Plaintiffs did not contend at trial that bifurcation in any way forced them to revise their trial strategy. In fact, plaintiffs did not begin the presentation of their evidence until four days after the bifurcation order occurred. Plaintiffs have not pointed to anything in the record that indicates that the bifurcation order improperly limited their efforts to prove their claims of negligence. Plaintiffs called, and testimony was received from, eleven medical witnesses[10] and two lay witnesses, in addition to the parties themselves.

Further, plaintiffs' objection to bifurcation on the ground that the jurors might find for defendants on the liability issue so that they could be released sooner reflects a purely speculative belief that the jurors would seek expediency rather than fulfillment of their sworn obligations as jurors. We reject such a contention, and there is nothing in the record to support it.

On this record, the trial court did not abuse its discretion and, therefore, did not err in ordering bifurcation.

We next address whether the trial court erred when it refused to allow Adam to be in the courtroom for a brief appearance during the liability phase of the trial in order to allow the jury to view him. In granting defendants' motion to

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[9] Plaintiffs indicated to the trial court an intention to call at least three expert witnesses who would testify only about damages.

[10] The eleven medical witnesses were two pediatricians, two obstetrician-gynecologists, a child neurologist, a neonatologist, a perinatologist, a pathologist, and three registered nurses. Eleven medical witnesses testified for defendants.

exclude Adam from the courtroom during the liability phase of trial, the trial court stated that Adam could not "meaningfully participate in [the trial]," that Adam was "represented by his mother who's his guardian [*ad litem*] for the purposes of this trial," and that "the sole purpose of [an appearance] would be to prejudice the jury."

On only a few occasions has this court addressed a trial court's authority to exclude parties from a trial. In *Schneider v. Haas*, 14 Or 174, 175, 12 P 236 (1886), this court interpreted a statute that allowed the exclusion of a witness not to apply to parties:

> "The very right to prosecute a suit in court and to appear therein as a party carries with it, as a necessary incident, the further right to be present during the trial; * * * [the parties] cannot be deprived of it by the court against their will, when they are present, endeavoring to maintain it."

That principle was iterated in *Leson and Leson*, 293 Or 368, 370, 648 P2d 55 (1982), when this court held that a trial court lacked authority to exclude a father during custody proceedings when the trial court took the child's testimony.

Both *Schneider* and *Leson* emphasize that a party has a right to be present during trial. In *Leson*, however, this court stated that a party's right to be present at trial may be waived "by [the party] omitting and neglecting to attend" the trial. 293 Or at 370 (quoting *Schneider v. Haas*, *supra*, 14 Or at 175). The right of a party to be present during trial is implicitly stated in OEC 615, which provides:

> "At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person * * *."

The issues presented in this case, then, are (1) whether a party, who is available to attend the trial, has an absolute right to be present during the liability phase of a trial and, if not, (2) whether the trial court, on the facts of the record, erred in not allowing Adam to enter the courtroom during the liability phase solely for a brief appearance to allow the jury to view him.[11]

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[11] At trial, counsel for Adam argued that Adam was entitled to be present during the trial of the liability issue by virtue of the provisions of Article I, section 10,

Appellate courts from other jurisdictions frequently affirm the rulings of trial courts excluding disabled or incompetent plaintiffs from the liability phase of a bifurcated trial. The standard developed by many of those courts is that a plaintiff who is unable to comprehend, to meaningfully participate in the proceedings, or to assist his or her lawyer in the presentation of the case may be excluded from the liability portion of the trial if the trial court, in the exercise of informed discretion, determines that the party's presence would be unfairly prejudicial. *See, e.g., Helminski v. Ayerst Lab.*, 766 F2d 208, 213-18 (6th Cir), *cert den* 474 US 981 (1985) (discussed *infra*); *Morley v. Superior Court of Arizona, Etc.*, 131 Ariz 85, 638 P2d 1331, 1333-34 (1981) (discussed *infra*); *Gage v. Bozarth*, 505 NE2d 64, 67-69 (Ind App 1987) (exclusion of seven-year-old automobile accident victim from liability phase of bifurcated personal injury trial was not abuse of discretion where evidence supported findings that presence of plaintiff, who was quadriplegic and dependent on ventilator to breathe, was potentially prejudicial to jury, and that plaintiff was unable to comprehend proceedings or to assist his counsel); *In re Richardson-Merrell, Inc. Bendectin Products*, 624 F Supp 1212, 1224 (SD Ohio 1985) (exclusion of children with birth defects from courtroom was appropriate during causation phase of bifurcated trial of products liability action brought by those children against manufacturer of drug that allegedly caused birth defects, presence of children would be inherently prejudicial, no testimony by children was contemplated, and children could not meaningfully consult with counsel in presentation of case);

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or Article VII (Amended), section 3, or both, of the Oregon Constitution.

Article I, section 10, provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Article VII (Amended), section 3, provides in part:

"In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, * * *."

On appeal, however, no assignment of error raises or relies on constitutional issues about a civil party's right to be present during a jury trial. We decline to address such issues in the absence of assigned error, and we express no opinion on whether the outcome of this case would be different if constitutional grounds had been assigned.

Monteleone v. Gestetner Corp., 140 Misc 2d 841, 531 NYS 2d 857, 860-61 (NY Sup Ct 1988) (ten-year-old boy, born without arms and with functional but substantially shortened legs, could be excluded from liability portion of his trial against companies allegedly responsible for his defects, as his presence would prejudice jury, and his youth and naivete precluded his ability to comprehend proceedings and in any meaningful way to assist counsel on complex issues of chemistry and teratogeny involved in liability aspect of trial).

The *Helminski* and *Morley* opinions are most instructive. In *Helminski v. Ayerst Lab.*, *supra*, the Sixth Circuit Court of Appeals affirmed the trial court's bifurcation of liability and damages and its exclusion of the incompetent child in a suit by his guardian *ad litem* against an anesthetics manufacturer for developmental injuries allegedly suffered *in utero*. In so doing, the court noted that a hearing on potential jury prejudice prior to exclusion would be the best course, 766 F2d at 217, but concluded that the trial court's failure to hold such a hearing was not reversible error:

> "[W]here the Helminskis acted as [child's] next friends and legal representatives, where all parties agree that [child] was completely unable to comprehend the proceedings, and where [child,] because of his extremely low I.Q.[,] could not aid his attorney in any meaningful way, we conclude that [child's] exclusion does not constitute reversible error."

766 F2d at 218.

In *Morley v. Superior Court of Arizona, Etc.*, *supra*, 638 P2d at 1334, the Supreme Court of Arizona stated:

> "Having considered the various precedents, we believe the best rule is applied in *Dickson v. Bober*. '[A] plaintiff unable by reason of his injuries to contribute or understand the trial proceedings' may be excluded, in the court's discretion, from the trial of the *liability* issue if the plaintiff will be 'fully and adequately represented by counsel.' A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial. If in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally

irrelevant to the liability issue." (Citations omitted.) (Emphasis in original.)

We adopt the standard that a plaintiff who is unable to comprehend, meaningfully participate in the proceedings, or assist his or her lawyer in the presentation of a case may be excluded from the liability portion of a bifurcated trial if the trial court, in the exercise of informed discretion, determines that the party's presence would be unfairly prejudicial. We conclude that the trial court's ruling that excluded Adam from the courtroom during the *liability* phase of trial was a proper exercise of informed discretion. We agree that the preferred method is for the trial court to hold a formal hearing and personally view the party before it makes a ruling on whether to exclude that party from the liability phase of trial.

In this case, although the trial court did not hold a formal hearing, it did have a significant amount of information on which to base an informed decision. The trial court's exclusion ruling was made during the sixth day of trial. By that time, the court had heard detailed testimony from numerous medical experts about perinatal asphyxia, hypoxia, neurological problems, and damage to Adam's brain. There was evidence that Adam suffers eight to twelve seizures per day. Plaintiffs' Fourth Amended Complaint for Damages, which formed the basis for Adam's case, claimed injuries, including "intellectual impairment, including mental retardation, seizures, the inability to control his limbs (spastic quadriplegia), and dysfunction of other bodily functions." There is no dispute that Adam could not comprehend or meaningfully participate in the proceedings or assist his lawyers. There is no suggestion that jurors' observations of Adam would have helped them to understand the evidence. There is nothing in the record about how Adam's personal presence in the courtroom could have aided the jury in determining whether defendants were negligent and, if so, whether that negligence caused Adam's extensive injuries. Adam was represented and his interests were to be protected by his mother, guardian *ad litem*, and by his lawyers.[12]

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[12] ORCP 27A and 27B provide that when a minor who is a party to an action does not have a guardian or conservator, the minor shall "appear by" a guardian *ad litem*.

We conclude that the trial court had an ample basis to believe that Adam's presence in the courtroom during the liability phase of the bifurcated trial may have caused the jury to decide the question of liability on an improper basis, *i.e.*, an emotional one. The trial court did not abuse its discretion and, therefore, did not err in excluding Adam from the liability phase of the trial.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

ORS 20.150 provides for recovery of costs when "a party appears by * * * guardian *ad litem*" and refers to the party as the one "for whom appearance is made."

ORS 30.810 provides for inclusion of the parents' medical expenses as damages when "the guardian *ad litem* of a child maintains a cause of action for recovery of damages to the child."

Argued and submitted December 19, 1989, reversed and remanded October 17, Diehl's reconsideration and Charles' reconsideration denied December 12, 1990, Pendleton Community Memorial Hospital's reconsideration denied January 16, all petitions for review allowed February 5, 1991 (311 Or 150)
See later issue Oregon Reports

Adam Charles BREMNER,
by and through
his guardian ad litem Deborah A. Bremner,
Deborah A. Bremner and Brian G. Bremner,
Appellants,

v.

Ellen CHARLES, M.D.,
Joseph H. Diehl, M.D.,
and Pendleton Community Memorial Hospital,
Respondents.

(CV 86-163; CA A45607)

799 P2d 188

Mother and her child sued obstetrician, doctor who attended mother during labor and hospital where child was delivered for medical malpractice. The Circuit Court, Umatilla County, J. F. Olsen, J., entered jury verdict for defendants and plaintiffs appealed. The Court of Appeals, Rossman, J., held that bifurcation of trial in conjunction with exclusion of child plaintiff from courtroom deprived plaintiffs of fair trial.

Reversed and remanded.

Warren, J., dissented and filed opinion.

1. Appeal and error—Review—Discretion of lower court

Trial court's decision to try case in separate phases is reviewed for abuse of discretion. ORCP 53B.

2. Trial—Course and conduct of trial in general—Regulation in general

Range of trial court's discretion is particularly wide in rulings concerning judicial administration; however, discretion is not to be capriciously or oppressively exercised.

3. Trial—Notice of trial and preliminary proceedings

Threshold requirement for bifurcating case for trial is that issues at each stage be separate. ORCP 53B.

4. Trial—Notice of trial and preliminary proceedings

Bifurcation of trial on issues of liability and damages and exclusion of infant plaintiff from courtroom in medical malpractice suit deprived plaintiffs of fair trial; although questions of liability and damages were not completely intertwined, bifurcation ruling placed plaintiffs at a disadvantage and seeing infant plaintiff might have enabled jurors to better understand evidence. US Const, Amend VI; ORCP 53B.

5. Trial—Course and conduct of trial in general—Presence of parties and counsel

Exclusion of party from trial is extreme measure that must be viewed with caution.

CJS, Trial § 9.

Appeal from Circuit Court, Umatilla County.

J. F. Olsen, Judge.

Jossi Davidson, Silverton, argued the cause and submitted the briefs for appellants.

Jeffrey Scott Eden, Portland, argued the cause for respondent Ellen Charles, M.D. With him on the brief were Thomas E. Cooney and Cooney, Moscato & Crew, P.C., Silverton.

Mildred J. Carmack, Portland, argued the cause for respondent Joseph H. Diehl, M.D. With her on the brief were David K. Miller and Schwabe, Williamson & Wyatt, Portland.

Emil R. Berg, Portland, argued the cause for respondent Pendleton Community Hospital. With him on the brief were Robert M. Keating, Lindsay H. Hughes and Hallmark, Keating & Abbott, P.C., Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed and remanded.

Warren, J., dissenting.

ROSSMAN, J.

In this medical malpractice action, plaintiffs are Adam, a three-year-old child, and his mother.[1] Defendants are Dr. Charles, mother's obstetrician during her pregnancy with Adam; Dr. Diehl, who attended mother during her labor and delivery; and the hospital where Adam was delivered. Plaintiffs appeal the trial court's judgment entered on a jury verdict in favor of defendants, assigning as error, *inter alia*, several rulings made by the trial court. We write to address only two contentions: The trial court erred in bifurcating the trial and in excluding Adam from the courtroom.[2] The focus of our inquiry is on whether the trial court's decisions deprived plaintiffs of a fair trial.

Plaintiffs alleged in their complaint that Adam suffered permanent brain damage as a result of defendants' negligence. According to the complaint, he will continue to suffer intellectual impairment, mental retardation, seizures, inability to control his limbs and other bodily dysfunctions. On the morning of trial, plaintiffs' counsel advised defendants' counsel, as a professional courtesy, that plaintiffs' case would take approximately a day to a day and a half longer than the original tentative schedule that they had discussed. Plaintiffs' counsel also submitted to defendants and the court a list of witnesses that plaintiffs intended to call, identifying each as either a "liability" or a "damages" witness.

Defendants then moved to try the liability portion of the case first, arguing that that would enable the parties to adhere to the original "schedule" and would avoid the need for defendants to reschedule their witnesses. The trial court granted the motion over plaintiffs' objection. Defendants also moved, before trial, to exclude Adam from the courtroom. Although the trial court initially reserved its ruling, it later denied plaintiffs' request that Adam be allowed in the courtroom for a "brief presence," ruling that he should be excluded entirely from the liability phase of the trial.

Plaintiffs first argue that the trial court's decision to

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[1] Plaintiff Brian Bremner, Adam's father, was voluntarily dismissed by the court on stipulation.

[2] Plaintiffs assign error to numerous other discretionary rulings of the trial court. Given our disposition of the appeal, it is unnecessary to address them.

bifurcate the trial was an abuse of discretion. According to plaintiffs, jury decisions on liability are based partly on the jury's awareness of damages. Thus, bifurcation must be applied cautiously, because it may change the nature of the decision making process itself. For that reason, plaintiffs assert, bifurcation of the issues of liability and damages should be allowed only in exceptional circumstances, *e.g.*, where it is necessary in order to expedite the litigation and where the issues of liability and damages are entirely separate. *State ex rel Perry v. Sawyer*, 262 Or 610, 500 P2d 1052 (1972). Otherwise, they maintain, there is a danger that "the right of trial by jury as declared by the Oregon Constitution or as given by statute" may not be preserved, as required by ORCP 53B. Plaintiffs argue that, in this case, the issues of liability and damages were not distinct and there was no showing of exceptional circumstances. Moreover, they were harmed by the trial court's ruling, both because the jury was barred from considering the interaction between liability and damages and because plaintiffs had to reformulate their entire trial strategy on the morning of trial. Those circumstances, plaintiffs maintain, demonstrate that the trial court's decision to allow bifurcation was error.

1, 2. ORCP 53B provides:

> "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or issues, always preserving inviolate the right of trial by jury as declared by the Oregon Constitution or as given by statute."

We review the trial court's decision to try the case in separate phases for abuse of discretion. *Vander Veer v. Toyota Motor Distributors*, 282 Or 135, 144, 577 P2d 1343 (1978). We are limited to determining whether the trial court has exercised its discretion to an end not justified by and clearly against the evidence and reason. *Casciato v. Oregon Liquor Control Com.*, 181 Or 707, 715-17, 185 P2d 246 (1947). The range of the trial court's discretion is particularly wide in rulings concerning judicial administration. *Weiss v. Northwest Accept. Corp.*, 274 Or 343, 356, 546 P2d 1065 (1976). However, that discretion is not to be "capriciously or oppressively exercised." *Mitchell v. Campbell*, 14 Or 454, 458, 13 P2d 190 (1887).

3, 4. In this case, several factors weigh against the trial court's action. First, a threshold requirement for bifurcating a case for trial is that the issues at each stage be separate. *Vander Veer v. Toyota Motor Distributors, supra,* 282 Or at 144. As plaintiffs point out, the issues of liability and damages were not entirely separate in Adams's case, because it was necessary to ascertain the nature of his physical problems in order to determine what caused them. Plaintiffs explain:

> "All the parties were aware that plaintiff's physical condition gave important clues as to the cause of his injury, and in fact provided the only evidence to determine the mechanism and timing of injury. To establish liability required plaintiffs to prove that Adam suffered a hypoxic injury near the time of birth (as opposed, for example, to a congenital defect), which required a detailed discussion of the physical damage to plaintiff's brain and other organs."

In short, the *nature* of Adam's condition was relevant to both the liability and the damages components of his claim.

At the same time, questions of liability and damages were not completely intertwined. Evidence concerning the severity of Adam's conditions, the prognosis and the extent and nature of his damages was not essential to a determination of liability. That is, the jury could properly reach a verdict on the question of liability without hearing evidence of his damages. Moreover, plaintiffs do not contend that the trial court's decision prevented them from introducing any evidence that would have been relevant to the question of liability. Although we may have decided the matter differently, we cannot say that the trial court's determination that the issues of liability and damages were sufficiently distinct to permit separating them was an abuse of discretion.

A second requirement of ORCP 53B, however, is that separate trials be ordered only "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Defendants argued in the trial court that, unless the trial were bifurcated, they would have to reschedule their witnesses. Plaintiffs responded that bifurcation would necessitate a complicated rescheduling of their "damages witnesses" and that it might also cause the jury to resolve the issue of liability against them simply in order to be done with the case. The trial court granted defendants' motion

to bifurcate on the ground "that it would result in economy of time for everyone concerned."

That was a questionable ruling from several standpoints. The trial court apparently reasoned that bifurcating the trial could save time because, if the jury found for defendants on the liability issue, it would be unnecessary to have a trial to determine damages. That ignores the fact that, if the jury were to render a verdict for plaintiffs on the liability issue, several witnesses would have to be recalled and some of the testimony on the nature of Adam's condition would have to be repeated in the damages phase, thereby lengthening the process as a whole. Nevertheless, time is a precious commodity for a trial court. The possibility that the bifurcation might obviate the necessity for a trial on damages was a legitimate ground for bifurcation, despite its somewhat speculative nature. *Vander Veer v. Toyota Motor Distributors, supra*, 282 Or at 144.

As important as judicial economy is, however, it cannot be pursued at the expense of fairness to one of the parties. In this case, bifurcation provided the possibility of a shortened trial and served to relieve defendants of the need to reschedule their witnesses. On the other hand, it required plaintiffs to juggle their witnesses' schedules, prevented plaintiffs from presenting the devastating nature of Adam's damages to the jury and forced plaintiffs to reevaluate their entire trial strategy on the morning of trial. In short, the ruling placed plaintiffs at a disadvantage that cannot be justified by economy or any other countervailing benefit.

In our view, the court's decision may have been sufficiently prejudicial to require reversal. However, we need not decide the case on that ground alone. Plaintiffs have contended that the trial court also erred in excluding Adam from the courtroom. We agree and conclude that, considered in conjunction with its decision permitting bifurcation, the trial court abused its discretion and deprived plaintiffs of a fair trial.

5. The exclusion of a party from the trial is an extreme measure that must be viewed with caution. That principle holds true, in large part, because

"[t]he very right to prosecute a suit in court and to appear

> therein as a party, carries with it, as a necessary incident, the further right to be present during the trial." *Leson and Leson*, 293 Or 368, 370, 648 P2d 55 (1982), *citing Schneider v. Haas*, 14 Or 174, 12 P 236 (1886).

A plaintiff's presence, however, is not always only for his benefit. Rather, as in this case, seeing the plaintiff might enable the jurors to understand better the evidence as it was presented in the courtroom, thereby assisting them in weighing and applying that evidence.

The trial court's view was:

> "I don't see how Adam could meaningfully participate in this. He has no awareness of what's going on. He can't testify. He's represented by his mother who's his guardian for the purposes of this trial. I think insofar as this phase is concerned, * * * I don't think I will permit him to come on in because I think the sole purpose of that would be to prejudice the jury."

We assume, without deciding, that there are circumstances in which a trial court may properly exclude a plaintiff because of potential prejudice. For example, some jurisdictions have held that a plaintiff who is unable to comprehend the proceedings, to aid his attorney or to contribute evidence on the question of fault may be excluded, if his injuries make his presence unduly prejudicial. *See, e.g., Helminski v. Ayerst Lab, a Div. of Amer. Home Prods. Corp.*, 766 F2d 208, 213-18 (6th Cir), *cert den* 474 US 981 (1985); *Morley v. Superior Court of Arizona, etc.*, 131 Ariz 85, 638 P2d 1331, 1333 (1981). We note, however, that the trial judge in this case had no evidence before him that Adam had a grotesque appearance or was disruptive in any way. Indeed, he had never seen Adam. Rather, he appears to have presumed prejudice from the description of Adam's condition, and that is an insufficient basis on which to exclude a plaintiff from his own trial.

Because the trial court's rulings deprived plaintiffs of a fair trial, we remand for a new trial.

Reversed and remanded.

WARREN, J., dissenting.

I dissent. The majority goes to great and painful lengths to find something wrong with the trial court's discretionary rulings. In the process, it has allowed the sympathetic

nature of plaintiffs' case to cloud its reasoning and has reached an incorrect result.

We review the trial court's rulings only for an abuse of discretion. In matters concerning the administration of a trial, the court's discretion is broad. *Weiss v. Northwest Accept. Corp.*, 274 Or 343, 356, 546 P2d 1065 (1976). The trial judge's decision to bifurcate the trial was based on its sound and legitimate determination that the issues of liability and damages were separate and that there was a likelihood that the proceeding could be shortened if the case was disposed of on the question of liability. Those were proper considerations. ORCP 53B; *Vander Veer v. Toyota Motor Distributors*, 282 Or 135, 143, 577 P2d 1343 (1978). Additionally, plaintiffs held out to the court that their witnesses on liability and damages could be segregated, lending further justification to the court's ruling. On appeal, they do not contend that they were prevented from putting on evidence relevant to the issue of liability. They argue only that they were prejudiced by the bifurcation, because they had to reorganize their trial presentation. They did not argue that issue to the trial court or request a continuance. I would conclude that bifurcation was not an abuse of discretion.

Additionally, I would hold that the decision to exclude Adam from the courtroom during the liability phase of the trial was not an abuse of discretion and certainly was not reversible error. Adam's interests were adequately represented by his mother, as guardian *ad litem*, and his attorney. There was nothing about his personal presence in the courtroom that could have aided the jury in determining whether defendants' negligence caused his extensive injuries. In view of the fact that Adam could not have assisted his counsel, his absence from the courtroom could have caused no prejudice to his liability case. On the other hand, the trial judge could believe that Adam's condition was such that his presence could give plaintiffs an unfair advantage by causing the jury to decide the question of liability based on sympathy, a factor that is irrelevant to any issue in the case and certainly to the issue of defendants' culpability. The court's ruling did not affect Adam's right to be present during the damages phase of the trial, when his physical appearance would have been relevant to the question of damages.

All of the rulings complained of by plaintiffs were within the trial court's discretion. Unless we can say that one ruling or more was beyond the range of the trial court's discretion, we should not reverse. The majority fails to point convincingly to any ruling in which the trial court acted improperly. It is difficult to understand how the two rulings which were not error can, when combined, constitute reversible error.

IN THE SUPREME COURT OF THE STATE OF OREGON

Adam Charles BREMNER,
by and through
his guardian ad litem Deborah A. Bremner,
Deborah A. Bremner and Brian G. Bremner,
Respondents on Review/
Petitioners on Reconsideration,

v.

Ellen CHARLES, M.D.,
Joseph H. Diehl, M.D.
and Pendleton Community Memorial Hospital,
Petitioners on Review/
Respondents on Reconsideration.

(CC 86-163; CA A45607;
SC S37668, S37674, S37713)

In Banc

On respondents on review's petition for reconsideration allowed March 24, 1992.*

Jossi Davidson, Silverton, filed the petition for reconsideration for respondents on review.

The response to the petition was filed by Mildred J. Carmack, of Schwabe, Williamson & Wyatt, Portland, for petitioner on review; with her on the response were Jeffrey S. Eden, of Cooney, Moscato & Crew, P.C., Portland, for petitioner on review Ellen Charles, M.D., and Lindsey H. Hughes, of Hallmark, Keating & Abbott, for petitioner on review Pendleton Community Memorial Hospital.

Kathryn H. Clarke, Portland, and John Paul Graff, Portland, filed a brief on behalf of *amicus curiae* Oregon Trial Lawyers Association.

Jana Toran, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon.

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* 104 Or App 75, 799 P2d 188 (1990), *rev'd*, 312 Or 274, 821 P2d 1080 (1991), on an appeal from the Umatilla County Circuit Court, Jack F. Olsen, Judge.

Jana Toran, of Ater Wynne Hewitt Dodson & Skerritt, Portland, filed a joint brief on behalf of *amicus curiae* ACLU Foundation of Oregon, with Kathryn H. Clarke, Portland, and John Paul Graff, Portland, on behalf of *amicus curiae* Oregon Trial Lawyers Association.

MEMORANDUM OPINION

Former opinion adhered to.